Neutral Citation Number: [2015] EWCA Civ 5

Case No: B3/2014/0176

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE MANCHESTER COUNTY COURT
HIS HONOUR JUDGE KEITH ARMITAGE QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/01/2015

Before :

LORD JUSTICE CHRISTOPHER CLARKE
LORD JUSTICE BEAN

and
SIR STANLEY BURNTON

- -

Between :

RICHARD THOMAS GILKS & ANOTHER	**Claimants/ Respondents**
- and -	
ADRIAN VERNON HODGSON & ANOTHER	**Defendants/ Appellants**

- -
- -

Caroline Hutton (instructed by **Geldards Solicitors LLP**) for the **Appellants/ Defendants**
Ian Foster (instructed by **Ralli Solicitors LLP**) for the **Respondents/Claimants**

Hearing dates : 12th, 13th, & 14th November 2014

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Approved Judgment

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Sir Stanley Burnton:

Introduction

1. This is the Defendants' appeal against the order of His Honour Judge Armitage QC dated 30 December 2013 in which he made declarations, to which I refer below, as to the boundary of the land known as Fiveacres owned by the Respondents and the land owned by the Second Defendant, and as to the Respondents' entitlement to a vehicular right of way over a way conveniently referred to as Clay Lane in so far as it is in the ownership of the Second Defendant. The judge also made consequential orders, including an order for the payment by the Appellants of damages for trespass and/or nuisance.

2. This is a depressingly unfortunate dispute between neighbours. The costs so far approach half a million pounds, far more than the value of the rights involved. It is a dispute that could and should have been compromised on terms that both parties could live with. The trial took 10 days, and even then some issues, referred to by the judge at paragraph 2 of his judgment, were left undecided.

3. The judicial time of determining the issues following the trial was greatly increased by the regrettable lack of time for the judge to write his judgment until several months after the trial. It is well known that the longer the period between a hearing and the writing of a judgment the longer is the time required to produce the judgment. The judge was assisted by the transcripts, but obtaining them added to the costs of this case for the legal system.

The properties and the issues

4. The properties in question are shown on the attached plan.

5. Clay Lane runs from Moor Lane, a public highway, to the north. It was originally a public footpath, but is now a public bridleway. It is sufficiently wide to have been given its own Ordinance Survey parcel number, 307.

6. Fiveacres, owned by the Claimants, has access to the public highways to the north west of its boundary with Clay Lane. The principal question in this case is whether it also has a right of access to the public highway at the south east, via Clay Lane.

7. The issues for the judge were:

    (1) What is the eastern border of Fiveacres, owned by the Claimants?

    (2) Does Fiveacres have the benefit of a vehicular right of way for agricultural purposes from the gate in its eastern boundary (a) to the east over Clay Lane and/or (b) to the south down Clay Lane towards Edge View Farm?

The eastern border of Fiveacres

8. As can be seen on the attached plan numbered 2, at the eastern edge of Fiveacres and Clay Lane there is a hedge, then a ditch, and then the public right of way. The Claimants are the successors in title to Alfred Harris, who purchased the freehold titles to Ordinance Survey parcels 351 and 352, i.e., Fiveacres, from Sampson Bloor.

The conveyance to Mr Harris bears an illegible date in 1950. Immediately before the execution of the 1950 conveyance, Mr Bloor was also the owner of the land to the east of Fiveacres, namely parcel 305, which he had purchased together with parcels 351 and 352 in 1935, the conveyance being dated 20 September 1935. He was also owner of parcel 307, i.e., Clay Lane between 305 to the east and 351 and 352 to the west, that parcel being part of his acquisition shown on the 1935 conveyance. Thus the 1950 conveyance separated 351 and 352 from 307 and 305 along a line to be deduced from that conveyance.

9. The 1950 conveyance describes the property conveyed as follows:

> ".. first all that pasture field known as Green Lane Field situate on the westerly side of and fronting to Paddock Hill Lane Mobberley in the County of Chester numbered 352 on the Ordinance Survey Map of Cheshire (1909 Edition) and containing in the whole 2.605 acres or thereabouts… and secondly all that piece or parcel of land (formerly 3 several plots of land) situated near Lindow Farm Mobberley aforesaid called "the Long Croft" "the Middle Croft" and "the Bottom Croft" containing in the whole two acres of land statute measure or thereabouts and being Numbered 351 on the said Ordnance Survey Map and thereon shown as containing 2.252 acres or thereabouts … which said properties first and secondly hereinbefore described are for the purposes of identification only and not of limitation or enlargement delineated on a plan annexed hereto and thereon edged red …"

10. The plan annexed to the 1950 conveyance clearly shows the ditch running along Clay Lane until it departs from it, continuing to the north at the point where the Lane turns east running to the south of Ivy Cottage and The Yews, before it continues to the north. The eastern boundary shown by the red line on the annexed plan clearly does not include the ditch.

11. The expert witnesses called by both parties agreed that the acreages given on the 1909 OS survey plan and repeated in the 1950 conveyance were acreages produced by the OS by use of a planimeter on the survey plan, and, in accordance with standard OS practice, included the strip of land between the roots line of the hedge and the centreline of the ditch. Unless, therefore, the 1950 conveyance is to be interpreted as conveying additional land to the east of the centre line of the ditch, that line was and is the eastern boundary of Fiveacres.

12. The judge held that the eastern boundary of Fiveacres is the centre line of Clay Lane. He arrived at this conclusion by the application of the archaically termed presumption *usque ad medium filum viae*, the presumption that the owner of land bordering a right of way is the owner of the land subject to the right of way (public or private) to the mid-point of the way. Leaving aside the question (raised by Morgan J in his reliable summary of the presumption in *Paton v Todd* [2012] EWHC 1248 (Ch) at [35]) whether the presumption is applicable to a public footpath, which was the status of the way in 1950, its application depends on the land to which it is sought to apply the presumption abutting the way. In the present case, that question in turn depends on whether the western ditch along the way is part of the way. It would be if it were a so-called road or highway ditch, built to take surface water from the road or way. If the ditch is not part of the way, but at least the eastern half of it was retained by Mr Bloor when he executed the 1950 conveyance, the presumption cannot apply.

13. In my judgment, the ditch is not a part of the way. It runs along a line that, as mentioned above, departs from the line of the way to the north. The ditch drains land to the north. If it were constructed to drain the public right of way it would follow the line of Clay Lane to the north, but it does not. Indeed, there is evidence that the ditch is shown as the public boundary on the 1855 Indenture plan. Furthermore, the judge's construction is inconsistent with what appears to have been the carefully drawn boundary marked on the plan annexed to the 1950 conveyance. It is true that the delineation was "for the purposes of identification only and not of limitation or enlargement", but that qualification does not justify ignoring it. There is also some significance in the fact that the parcels conveyed were not described, as they might have been, as abutting the way. Furthermore, there was good reason for Mr Bloor to want to retain the way, which was wide enough to be used for pasturing his animals. The fact that it was given a separate parcel number, 307, is itself indicative of its being significant in area, as Mr Powell, the Appellants' expert witness, stated in evidence, relying on *Oliver on the History of Ordinance Survey Maps.*

14. There is also a question whether the whole of OS 307 was in 1950 subject to the right of way, given that it is far wider than necessary for a footpath: see *Ford v Harrow UDC* (1903) 88 LT 394. In view of my conclusions set out in the preceding paragraph, it is a question I need not answer.

The right of way

15. The Respondents contended that they had a right of way from the gate to Fiveacres over the Appellants' land on two bases: that an easement or quasi-easement had been acquired under the 1950 conveyance, by virtue of the rule in *Wheeldon v Burrows,* and on the basis of prescription by the doctrine of the lost modern grant. The judge considered the *Wheeldon v Burrows* claim and then the prescription claim. However, given the difficulties, and perhaps the artificiality, of determining what access to Fiveacres existed and what use was made of it, over half a century ago, I prefer to consider the prescription claim first.

Prescription

16. The judge's summary of the applicable law at paragraphs 120 and 121 of his judgment has in the main not been challenged. The challenge by the Appellants has been to his analysis of the evidence.

17. The judge heard the testimony of numerous witnesses. He found, and was entitled to find, that the toxic relationship between the parties led to much of the evidence being at best unreliable. He carefully summarised the witnesses' evidence, and his findings as to who was and who was not a reliable witness were fully reasoned and cannot be, and are not, impugned. It follows that the question before this Court is whether the evidence accepted by the judge justified his finding of a prescriptive right.

18. In finding the claim of a prescriptive right of way proved, he stated that he relied on the evidence of fact of Mr Forrest, Mr Adshead, Miss Fawbert, Mr Sumner, Karl Eckert, Michael Eckert, Tregony Windsor, Mr Swan and Mr Anderton. It is also clear that he accepted the evidence of the Gilks, but that related to recent times only. The judge also referred to the evidence of aerial photographs dating from 1948 and 1963,

but they were of no assistance in deciding whether there was at either of these dates vehicular access to Fiveacres.

19. As mentioned above, the judge said that Mr Forrest's evidence did not support access to Fiveacres by vehicle.

20. Mr Adshead had never seen vehicles accessing Fiveacres through Clay Lane. He recalled seeing cartwheel marks inside the Fiveacres gate around 1949-50. The judge concluded that his evidence was "good evidence of vehicle use in the late 1940s and early 1950s". It seems to me that his evidence about cartwheel marks was evidence of a possibly isolated use of the gate by a vehicle. However, he also referred to Joe Eckert having an ex-army Bedford truck and a British Anzani tractor, which he used for the purposes of his working Fiveacres, and I read the judge as concluding that those vehicles were used in that period to and from the gate between Fiveacres and Clay Lane.

21. The judge summarised Ms Fawbert's evidence as follows:

> "… in the period about 1960 to 1965 there was a usable timber gate in the hedge or fence giving access from 352 onto Clay Lane over a culverted ditch and that it was used frequently for at least the passage of horses."

22. This evidence, of itself, could not justify the finding of a vehicular right of access.

23. Mr Sumner's evidence was that he had seen Joe Eckert drive a tractor accessing Fiveacres from Clay Lane "quite a long time ago", by which the judge said he meant 20 years. The judge stated that he found his direct evidence concerning the tractor convincing.

24. Karl Eckert's evidence was that from about 1973, as had his father before him, took tractors from Clay Lane into Fiveacres to tend the land, which he still did. He spoke of the relationship between his father and Mr Fisher, of Ivy Cottage, as to which the judge said:

> "Karl Eckert accepted that they could go where ever they liked when Mr Fisher was alive because of the close friendship between Mr Fisher and his father. I pause here to observe that that concession is not one of fact. It is, on analysis, an opinion probably based at best on an inference open to anyone aware of the friendship. It proves simply that, whatever their legal rights, these men did not insist upon them."

25. The judge summarised his conclusions in relation to Karl Eckert's evidence as follows:

> "… His factual evidence was honestly given and substantially accurate. His dates were the least reliable aspect of his evidence, but my judgement is that that does not undermine the essential thrust of his evidence that: in his lifetime, particularly his (Karl's) working lifetime, his father used an access point adjacent to the stile by Ivy Cottage, from Clay Lane to Fiveacres for work, sometimes for his father's direct and Mr Braka's indirect benefit and vice versa, and sometimes for access across Fiveacres to more remote worksites…"

26. Karl Eckert was born in 1957, when his family lived in The Yews. He was called on behalf of the Respondents. In his written witness statement, he said:

> "4. For as long as I can remember there has always been an access leading from Clay Lane directly onto Fiveacres at the south eastern boundary of the property. As a child I would regularly use this access to play in the field forming part of Fiveacres.
>
> 5. I would often help my father tend to land at Fiveacres with his tractors and he would always access to land directly from Clay Lane. In fact I can recall from as young as 16 years old I was taking the tractors onto Fiveacres to tend to this land myself and always gained access directly from Clay Lane.
>
> 6. I still tend to land at Fiveacres and often make hay for the Claimants using the field on their property. I therefore continue to take my tractors onto the land at Fiveacres for this purpose and I always gained access directly from Clay Lane."

27. In cross-examination, he confirmed that his father, Joe Eckert, who owned The Yews and was for a period the tenant of part of Fiveacres, and Mr Fisher, who lived in Ivy Cottage from 1952., were close friends. "Jack Fisher was our taxi. He would run us to places and things like that." The closeness of their relationship may be inferred from the fact that in his 1988 will, Mr Fisher devised Ivy Cottage to Josef and Irene Eckert if they survived him. It was put to Karl Eckert: "… As far as Jack Fisher was concerned your father could go up and down as much as he liked between The Yews and Jack Fisher's land and anywhere that your father happened to be working. That is right, is it not?" He answered, "Yes, it was, yes." Later in his evidence he was asked why he had made a witness statement. He said:

> "There was an issue over where I could go and where I could not go. *You rightly said that Jack Fisher said I could go where ever I wanted to go* and all of a sudden I couldn't go wherever I want to go because people dug up accesses, put gates in the way, blocked my way, and I carried on going up to Edge View and into Fiveacres and I got a letter of my sister's solicitor telling me I was trespassing."

28. The italics are of course mine. In fact, it had not been put to him that Mr Fisher had given express permission to him to go wherever he wanted to go. Ms Hutton did not pursue this evidence, presumably because she was concerned that Mr Eckert might go back on it. Mr Foster did not re-examine on it, doubtless out of concern that it might be fortified. The judge did not ask about it, and did not refer to it in his judgment. This evidence is I think inadequate to justify a finding of express permission, and I note that in her skeleton argument for this appeal Ms Hutton contended that "The facts fall within the definition of *implied* licence …" (my italics). If this unexpected statement (in support of an unpleaded allegation of express consent) was to be relied upon, the witness should have been asked about it specifically.

29. Michael Eckert said of the gate in question, as summarised by the judge, that when he was 15 (in about 1974) and before he started caring for the horses at Fiveacres, his father had replaced a broken down gate near the stile, not put in a new access point. At that time he recalled Karl (who he did not rate highly as a tractor driver) driving a

tractor through that access. The tractor had a wooden cab. It had kept boiling while being used to spread fertiliser on Fiveacres. The judge said:

> "I found Michael Eckert's evidence convincing on the proposition that there had been a usable gate and crossing at the latest by 1974 and probably for years before that, based on his father's replacement of a derelict gate."

30. Mrs Windsor's evidence was taken as "reliable evidence of the existence and use of the gate and crossing between Fiveacres and Clay Lane". The use referred to, however, was horse riding.

31. David Swan gave evidence, accepted by the judge, that from about 1976 and after he had seen agricultural vehicles using the gateway in question on 3 or 4 occasions. The judge said: "I am convinced that he was reliable as a snapshot of the condition and use of the gate (and by inference at least) the existence of a means of crossing any ditch which elsewhere might have been open."

32. Mr Anderton has been the owner of Edge View Farm, to the south of the Second Appellant's and the Respondents' land, since 1995. The judge regarded his evidence as establishing that historically the owners of Edge View Farm had unchallenged physical access to Clay Lane with animals and vehicles, as necessary.

33. The judge concluded:

> "295. I am satisfied, to the extent that it is more likely than not, that:
>
> (i) There was agricultural vehicular access between 352 (and 351) and Clay Lane… From before 1948. It seems likely that the amount of actual usage was dictated by the type of agricultural use of 351 and 352, year by year and season by season.
>
> (ii) That such use was not permissive. There was no reason to infer that Mr Fisher other than tolerated use by or on behalf of Mr Harris or by on behalf of Mr Braka. In the latter case there is direct acceptable evidence that Mr Fisher had stood by while the access was used by women with horses, who had no knowledge of the need for or fact of any permission or the existence of neighbourly relations. In the case of Joe Eckert the evidence is that he did as he pleased. What he did at Fiveacres was of direct benefit to the owners of that land. Although he was friendly with Mr Fisher there is nothing to suggest that he used the access with Mr Fisher's permission.
>
> …
>
> 297. I find, therefore, that a prescriptive right-of-way exists, established by use as and when required for agricultural purposes, on foot and by vehicle, with a horse and cart or cultivating implement or later their motorised equivalents, without permission and uninterrupted by challenge, the period March 1950 to 2009, and that the way was in the same place and of the same dimensions as that in use immediately before the defendants dug out the culvert and barred the gate."

34. The evidence supporting this conclusion, in so far as it related to that part of Clay Lane to the east of the gate into Fiveacres was, as the above summary demonstrates, light. I am nonetheless just persuaded that it does justify his conclusion.

35. The evidence of Carol Cash was inconsistent with the judge's conclusion. The judge rejected her evidence, for the reasons given in paragraphs 261 to 269 of his judgment. Ms Hutton submitted that the judge's reasons were insufficient to justify the wholesale rejection of Mrs Cash's evidence, but the reasons he gave were in my judgment adequate and not such as to entitle this Court to interfere.

36. In the result, therefore, I would dismiss the appeal against the judge's finding that on the basis of prescription the Respondents have a vehicular right of way, for agricultural use, to the east of the gate into Fiveacres over the Appellants' land, as shown on the second plan annexed hereto coloured brown.

Implied easement under the rule in *Wheeldon v Burrows* and the right of way claimed to the south

37. My conclusion on prescription renders it unnecessary to determine the appeal against the judge's finding of an implied easement under the rule in *Wheeldon v Burrows* in relation to that part of Clay Lane to the east of the gate into Fiveacres, and I do not propose to do so.

38. The position in relation to the right of way claimed to the south is very different. There was no evidence of vehicular use of the way to the south in 1950, and no such evidence of such use even approaching 20 years before the dispute between the parties arose. Moreover, the way to the south, as distinct from that to the north, could not be seen as necessary for the reasonable enjoyment of Fiveacres. For these reasons, I would allow the appeal in relation to that right of way.

Conclusion

39. For the reasons I have given, I would allow the appeal on the boundary issue, but dismiss it on the right of way issue.

40. If my Lords agree with my conclusions, I would ask counsel to agree an order reflecting them. The order should provide for costs to be determined by the Court on the basis of the parties' written submissions.

Lord Justice Bean

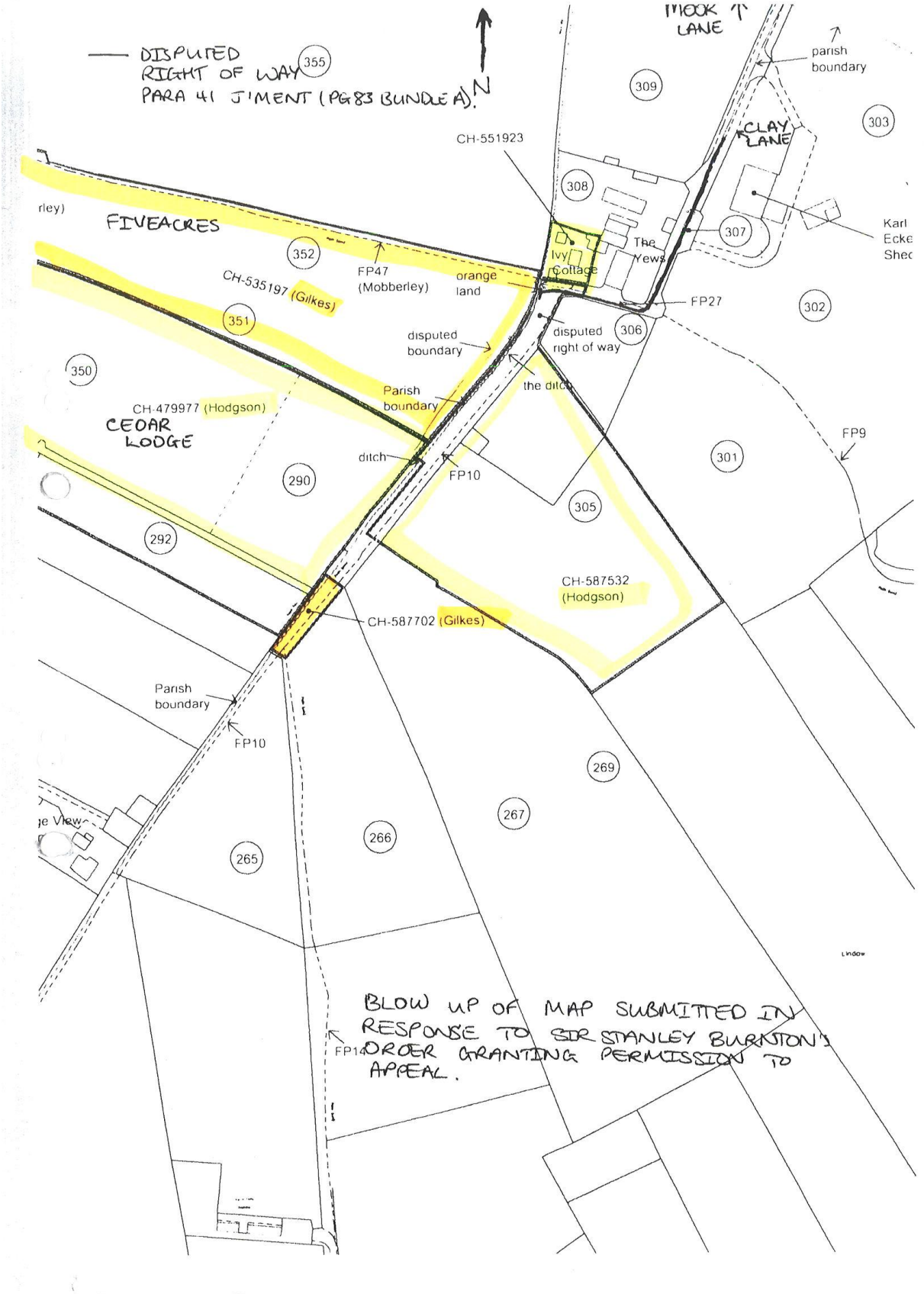
41. For the reasons given by Sir Stanley Burnton, with which I agree, I too would allow the appeal on the boundary issue and against the finding of a vehicular right of way from Fiveacres along Clay Lane to the south but dismiss the appeal against the judge's finding that the Respondents had acquired a vehicular right of way by prescription from Fiveacres along Clay Lane to the east and then north..

42. I only add how dismayed I have been by this Dickensian litigation. The disputed strip of land and right of way do not constitute the sole means of access to anyone's home. The award of damages to Mr & Mrs Gilks was £3,500. Yet, at a time when the courts are under great pressure, the battle between these two couples took up ten days of court time – more than some murder trials – before Judge Armitage and a further

three days in this court; and about half a million pounds has been spent in costs. It is almost as though Lord Woolf and other civil procedure reformers over the years have laboured in vain.

Lord Justice Christopher Clarke

43. I agree with both judgments. As to the former I agree that the judge was entitled to find that those who had used the vehicular access in question had done so as if they had a right to do so, which is the basis for prescription: *R (on the application of Barkas) v North Yorkshire County Council* [2014] UKSC 31 [14]. If and insofar as the judge thought that "neighbourly tolerance" was inconsistent with prescription (as para 120 (ii) of his judgment suggests), he was, in my view, in error. Prescription is founded on acquiescence by the owner (as opposed to licence) and "passive toleration is all that is required for acquiescence": Gale on Easements (19th Edition, 2012), para 4-115, which was said correctly to state the law in *Barkas*. As to the latter the enmity between the parties has caused them to incur costs and to use up the time of the courts (to the detriment of other litigants) to an extent grossly disproportionate to what was at stake. If parties, or one of them, insist on litigating in this way, it is difficult for the court to cut short their wasteful endeavours, however much it may try to do so. I hope that the example of this litigation may encourage others who are concerned in like disputes (and, as importantly, those who advise them) to take every step that they can to avoid the absurd waste of effort, time and cost (for both parties) which this case has involved.


DISPUTED RIGHT OF WAY PARA 41 J'MENT (PG 83 BUNDLE A)
N
MOOR LANE
parish boundary
CLAY LANE
CH-551923
355
309
303
308
307
FIVEACRES
352
FP47 (Mobberley)
orange land
Ivy Cottage
The Yews
Karl Ecke Shed
CH-535197 (Gilkes)
351
FP27
302
disputed boundary
disputed right of way
306
350
Parish boundary
the ditch
CH-479977 (Hodgson)
CEDAR LODGE
FP9
ditch
FP10
290
301
305
292
CH-587532 (Hodgson)
CH-587702 (Gilkes)
Parish boundary
FP10
269
267
266
265
BLOW UP OF MAP SUBMITTED IN RESPONSE TO SIR STANLEY BURNTON'S ORDER GRANTING PERMISSION TO APPEAL.
FP14